the Telecommunications Act of 1996, Congress directed:

> "[t]he Commission . . . [to] encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . regulatory methods that remove barriers to infrastructure investment."

Pub. L. No. 104-104, 110 Stat. 153, Title VII, § 706(a) (1996).[93] Congress, therefore, in the Commission's organic act itself and in other legislation, has made plain its desire that the Commission, acting on behalf of the United States, should regulate to foster the development and deployment of new means of radio communication.

The Commission, in fact, acting pursuant to this congressionally delegated authority, has preempted state and local regulations many times when it thought it necessary to achieve its legislated purposes. These preemptions have been upheld by the Supreme Court and the Courts of Appeal on numerous occasions and in a variety of contexts.[94] In addition, the Commission has, in

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[93] "Advanced telecommunications capability" is defined "without regard to any transmission media or technology [sic], as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Pub. L. No. 104-104, 110 Stat. 153, Title VII, § 706(c)(1) (1996). It is unclear whether this provision was intended to include digital television. While on the one hand, the policy expressly declaims limitations as to transmission media or technologies, on other the other hand, the descriptive series "high-speed, switched, broadband" does provide parameters for such media or technologies. There is no further indication, however, that the telecommunications capability must be all three. Digital television plainly fits the definition in all respects, except it is not switched. In any event, the directive nevertheless demonstrates that Congress is particularly concerned that the advent and provision of new telecommunications capabilities not be hindered by barriers to infrastructure investment as a general matter. Although the siting of broadcast towers may not have been foremost in Congress's collective mind, the directive provides analogous support for the view that the Commission should regulate so as to ensure the rapid deployment of those new technologies that the Commission finds to be in the public interest, including at the fundamental level of infrastructure, as broadcast towers are.

[94] *See, e.g.*, *City of New York*, 436 U.S. 57 (upholding the Commission's preemption of more stringent local regulation of cable television signal quality standards); *Capital Cities Cable*, 467 U.S. 691 (upholding the Commission's preemption of an Oklahoma law requiring cable operators to block alcoholic beverage advertising on their systems); *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804 (D.C. Cir. 1984) (upholding the Commission's preemption of state and local entry regulation of SMATV); *New York State Comm'n on Cable Television v. FCC*, 669 F.2d 58 (upholding the Commission's preemption of state and local entry regulation of MDS).

For a comprehensive discussion of the Commission's preemption authority, but one unfortunately now dated, see Richard McKenna, *Preemption Under the Communications Act*, 37 FED. COMM. L.J. 1 (1985).

numerous other proceedings, preempted, or recognized its authority to preempt, state and local regulations specifically relating to zoning and land use.[95]

4. The proposed rule falls within the scope of the delegated authority

By understanding the jurisprudential considerations that underlie the preemption doctrine, together with the purpose, structure, and subject matter of the Commission's organic act, it becomes plain that the Commission has been empowered to preempt state and local regulations that affect tower siting. Towers are crucial to broadcast service Without towers (and other structures) to place broadcast antennas, the broadcast service would never be able to fulfill its goal of providing nationwide service. Therefore, matters infringing on the placement and construction of such towers are also matters that infringe on the federal policy favoring broadcast service generally. Because the Commission has broad authority to regulate all matters relating to radio communications services, the Commission also has authority with respect to state and local impediments to the construction of broadcast transmission facilities.

Once the Commission resolves to preempt an area of radio communication regulation, so long as the Commission's action "'represents a reasonable accommodation of conflicting policies' that are within the agency's domain," the natural conclusion to draw is "that all conflicting state

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[95] *See, e.g.*, Preemption of Local Zoning Regulation of Satellite Earth Stations, *Notice of Proposed Rulemaking*, IB Docket No. 95-59, FCC 95-180, 2 Comm. Reg. (P & F) 2175 (released May 15, 1995); Preemption of Local Zoning Regulation of Satellite Earth Stations, *Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 5809 (1996); Preemption of Local Zoning Regulation of Satellite Earth Stations, *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 19276 (1996); Preemption of Local Zoning or Other Regulation of Receive-Only Satellite Earth Stations, *Report and Order* CC Docket No. 85-87, 100 FCC 2d 846, 59 Rad. Reg. 2d (P & F) 1073 (1986), *reconsideration denied*, 2 FCC Rcd 202 (1987); *Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities*, 50 Fed. Reg. 38813 (Sept. 25, 1985).

regulations have been precluded." *Capital Cities Cable*, 467 U.S. at 700 (quoting *Shimer*, 367 U.S. at 383). In fact, the Supreme Court has made it clear that courts should not disturb the Commission's decision to preempt "unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." *City of New York*, 486 U.S. at 64 (quoting *Shimer*, 367 U.S. at 383); *see also Capital Cities Cable*, 467 U.S. at 700.[96] Indeed, once the Commission has fashioned a reasonable accommodation between the conflicting federal and nonfederal interests, courts may not, "in the absence of compelling evidence that such was Congress' intention[,] . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes." *Southwestern Cable*, 392 U.S. at 177 (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 780).

[96] It is instructive that the Supreme Court will not infer, by negative implication, from a statute's silence that Congress disapproves of the Commission preempting state and local regulations. For example, in *City of New York*, the Court rejected the argument that 47 U.S.C. § 546(c)(1)(B) (1982, Supp IV) empowered local franchising authorities to establish their own comprehensive set of additional technical standards for cable television signal quality. The Court stated that it is "quite significant that nothing in the Cable Act or its legislative history indicates that Congress explicitly disapproved of the Commission's pre-emption of local technical standards." *City of New York*, 486 U.S. at 67 & n.4. Finding nothing in the Cable Act suggesting that preemption of local technical standards governing cable signal quality would not have been congressionally sanctioned, the Court upheld the Commission's preemption. *See id.* at 69-70. Similarly here, the Communications Act nowhere indicates or suggests that the Commission is without authority to preempt state and local regulations affecting tower siting. No negative implication that the Commission therefore lacks this authority may be drawn from the Act's silence.

In sum, Congress, pursuant to its power under the Commerce Clause, U.S. Const. art. I, § 8, to regulate interstate commerce in communication by radio, 47 U.S.C. § 151, has delegated the requisite authority to the Commission to preempt state and local laws and regulations that affect tower siting. Should the Commission adopt a rule in this proceeding preempting certain aspects of such state and local land use regulations that affect tower siting, that federal action would be the law of the land. The only check on the federal power to act in this way must come from the Constitution itself. Several commenters argue that numerous other constitutional provisions do, in fact, stand as barriers to the exercise of the Supremacy Clause and Commerce Clause powers in these circumstances.[97] Those arguments that interpose First, Fifth, and Fourteenth Amendment objections to the proposed preemption are meritless. More substantive is the suggestion that the Tenth Amendment circumscribes the power of preemption that may be exercised pursuant to the Commerce Clause in this proceeding. When properly considered, however, that suggestion also proves to be unprobative. These constitutional objections are considered below, beginning with the Tenth Amendment.

B. The Proposed Rule Does Not Infringe Upon Tenth Amendment Interests

Several commenters object that preemption of state and local land use regulations contravene the Tenth Amendment.[98] In substance, these commenters argue that the proposed preemption would commandeer state and local officials to enforce or administer a federal regulatory program in

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[97] *See, e.g.*, Comments of Concerned Communities and Organizations at 32-39; Comments of the City and County of San Francisco at 13-14; Comments of the City of Philadelphia at 22-36; Comments of the National League of Cities et al. at 5-10.

[98] The Tenth Amendment provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S.

contravention of *New York v. United States*, 505 U.S. 144 (1992), and *Printz v. United States*, 521 U.S.,138 L.Ed.2d 914, 117 S. Ct. 2365 (1997). A careful analysis of the relevant case law, however, reveals that those federal regulatory programs that have been struck down differ markedly and in crucial ways from the type of rule under consideration in this proceeding. These Tenth Amendment considerations, while worthy of the Commission's attention, ultimately do not affect the Commission's ability to preempt state and local laws that stand as obstacles to the accomplishment of congressional objectives

1. The proposed rule does not compel specific state/local actions

At issue in *New York* were three provisions of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Pub. L. No. 99-240, 99 Stat. 1842, *codified at* 42 U.S.C. § 2021b et seq. These provisions provided certain incentives to encourage the states to provide for the disposal of low level radioactive waste generated within their borders. Two of these provisions — one providing monetary incentives to states for complying with certain deadlines and another providing access incentives to disposal facilities — were upheld as proper exercises of Congress's Commerce Clause powers, either because the provision was supported by an affirmative constitutional grant of power or because it represented a conditional exercise of the commerce power. *See New York*, 505 U.S. at 171-74. The third provision, however, required the states either to regulate pursuant to Congress's express direction or to take title to and possession of the waste generated within their borders. This provision the Court struck down. *See id.* at 174-77.

The Court framed the issue before it as whether "Congress may direct or otherwise motivate

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Const. amend X.

the States to regulate in a particular field or a particular way." *Id.* at 161. Expressly *not* at issue was the federal government's authority to preempt state radioactive waste regulation or Congress's ability to subject a state to the same legislation applicable to private parties. *See id.* at 160. *New York*, therefore, is not a case pitting the Tenth Amendment against the Supremacy Clause. Instead, the Court read Tenth Amendment jurisprudence to mean:

> "even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce."

Id. at 166 (citations omitted). Nevertheless, Congress still retains the ability to encourage states to regulate in certain ways, so long as it does not resort to "outright coercion," for by "encouraging state regulation rather than compelling it" state officials remain accountable at the local level. *Id.* at 166, 168. Accordingly, the money and access incentives were deemed to be proper encouragement because the states were not compelled to regulate in accordance with federal directives. The take title provision, however, offered the states a false "choice" of either accepting ownership of the waste, which was tantamount to "commandeering" state governments into the service of federal regulatory purposes, or of simply submitting to a command to implement legislation enacted by Congress. Either way, the state legislative process would be compelled to enact and enforce a federal regulatory program, an outcome which was outside Congress's constitutionally-conferred authority. *See id.* at 175-76.

In *Printz*, the Court similarly determined that certain interim provisions of the Brady

Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536, were unconstitutional. The Brady Act required, *inter alia*, that the local chief law enforcement officer ("CLEO") perform background checks to determine whether a handgun sale was lawful, although the CLEO was not required to take any particular action if the sale was determined to be unlawful. This time the Court, in analyzing Tenth Amendment jurisprudence, and in particular its historical dimensions, concluded that portions of the Brady Act would not only infringe on state sovereignty by augmenting federal power through pressing into service, and at no cost, the police officers of the 50 states but also by effectively transferring to "thousands of CLEOs in the 50 States" the responsibilities of the Take Care Clause, U.S. Const. art. II, § 3, and then leaving them to "implement the program without meaningful Presidential control." *Printz*, 138 L.Ed.2d at 936. The Court summarized its essential holding as follows:

> "We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the States' officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program. It matters not whether policy making is involved, and no case-by-case weighing of the burdens or benefits is necessary; such commands are fundamentally incompatible with our constitutional system of dual sovereignty."

Id. at 944-45.

Read together, the lessons of *New York* and *Printz* teach that the Tenth Amendment constrains federal governmental power to compel states to enact legislation or to require local officials to implement a federal regulatory program. On their own terms, these cases would clearly prohibit the Commission either from compelling state and local legislative bodies to enact specific

land use regulations or from requiring local zoning administrators to act in the service of substantive Commission policy. Obviously, the proposed rule in this proceeding seeks to do neither of these. In fact, the proposed rule does not require state/local governments to take any specific action whatsoever.

2. The Commission can impose standards or procedures on state/local governments consistent with the Tenth Amendment

Neither *New York* nor *Printz*, however, dealt with the intersection of the preemption doctrine with the Tenth Amendment. As the *New York* Court recognized, "the Supremacy Clause gives the Federal Government 'a decided advantage in th[e] delicate balance' the Constitution strikes between state and federal power." *New York*, 505 U.S. at 159 (quoting *Gregory*, 501 U.S. at 460). Obviously, both *New York* and *Printz* leave considerable room for the federal government to act to achieve its constitutionally-authorized objectives without infringing on Tenth Amendment concerns. In order to better delineate the contours of the "decided advantage" of federal power, it is necessary to examine the two principal cases upon which *New York* and *Printz* relied, *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981), and *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742 (1982) ("*FERC*").[99]

In *Hodel*, an association of coal producers unsuccessfully challenged the constitutionality of the Surface Mining Control and Reclamation Act of 1977, 91 Stat. 447, *codified at* 30 U.S.C. § 1201 et seq. The Act required, *inter alia*, that an interim federal enforcement program be established for

[99] *See, e.g.*, *New York*, 505 U.S. at 161, 167, 170, 173-74, 176 (relying on *Hodel*); *id.* at 161-62, 167, 173-74 (relying on *FERC*); *Printz*, 138 L.Ed.2d at 938, 940 (relying on *Hodel*); *id.* at 938-41 & 141 n.14 (relying on *FERC*).

each state with respect to federally-prescribed environmental performance standards, to remain in effect until the state implemented its own permanent regulatory program. Although the states could issue permits for surface mining operations, the operations had to comply with the interim federal standards. If a state desired to implement its own permanent regulatory program over operations on nonfederal lands within its borders, it had to seek approval from the Secretary of the Interior and demonstrate that the state had enacted legislation implementing the environmental protection standards established by the federal government. *See Hodel*, 452 U.S. at 270-71. The *Hodel* Court expressly rejected the argument that the Act regulated land use as a local activity not affecting interstate commerce or that it impermissibly displaced the states' exercise of its police powers. *See id.* at 275-76, 281, 291. Instead, the Court determined:

> "If a State does not wish to submit a proposed permanent program that complies with the Act and implementing regulations, the full regulatory burden will be borne by the Federal Government. Thus, there can be no suggestion that the Act commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program. The most that can be said is that the Surface Mining Act establishes a program of cooperative federalism that allows the States, *within limits established by federal minimum standards*, to enact and administer their own regulatory programs, structured to meet their own particular needs. . . .
>
> [. . .]
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> Appellees' claims accurately characterize the Act insofar as it prescribes federal minimum standards governing surface coal mining, which a State may either implement itself or else yield to a federally administered regulatory program. To object to this scheme, however, appellees must assume that the Tenth Amendment limits congressional power to pre-empt or displace state regulation of private activities affecting interstate commerce. This assumption is incorrect."

Id. at 288-90 (citations omitted) (emphasis added).

On its own terms, *Hodel* therefore instructs that the Commission can preempt state and local

land use regulations to the extent that the Commission prescribes minimum federal standards with which the states must comply in administering their own land use or zoning schemes. It is also worth noting that the federal government could have preempted all surface mining regulations, but instead chose to allow the states to regulate in the field if their regulations comported with federal standards. This raised no Tenth Amendment problem: "We fail to see why the Surface Mining Act should become constitutionally suspect simply because Congress chose to allow the States a regulatory role." *Id.* at 290. Similarly, because the Commission could, pursuant to its broad congressionally-delegated authority, preempt all land use regulation affecting tower siting, that the proposed rule instead works within the general framework of established local land use regulation presents no Tenth Amendment difficulties.

FERC provides additional guidance in defining the Tenth Amendment's narrow limitations on federal power. In that case, various provisions of the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. No. 95-617, 92 Stat. 3117, were unsuccessfully challenged. PURPA directed, *inter alia*, both state utility commissions and nonregulated utilities to "consider" adopting and implementing specific rate design and regulatory standards. The Act also prescribed certain procedures that the utility commissions and nonregulated utilities were to follow when considering the proposed standards.[100] These entities, however, were not required to adopt the specified rate design or regulatory standards. *See FERC*, 456 U.S. at 746-50. That lack of compulsion was central to the Court's ruling that because the federal scheme "simply condition[s] continued state

[100] These procedures required, *inter alia*, that each proposed standard was to be considered at a public hearing, after notice; that, if the standard was not adopted, a written statement of the reasons would be made publicly available; and that any person could bring an action in state court to enforce these obligations.

involvement in a pre-emptible area on the consideration of federal proposals," there was no threat to state sovereignty; indeed, as in *Hodel*, the Court saw the federal approach as a vehicle by which states could "remain[] active in an area of overriding concern." *Id.* at 765. The Court again trumpeted the supremacy of federal law, even where the states' exercise of their police powers was displaced and even where the manner is "extraordinarily intrusive." *Id.* at 767 (citation omitted). In fact, in both *Hodel* and *FERC*, the Court rejected the argument that it was "constitutionally determinative that the federal regulation is likely to move the States to act in a given way, or even to 'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of "integral governmental functions."'" *Id.* at 766 (quoting *Hodel*, 452 U.S. at 289). The *FERC* Court concluded by also holding that the prescriptive procedural provisions passed constitutional muster:

> "If Congress can require a state administrative body to consider proposed regulations as a condition to its continued involvement in a pre-emptible field—and we hold today that it can—there is nothing unconstitutional about Congress' requiring certain procedural minima as that body goes about undertaking its tasks. The procedural requirements obviously do not compel the exercise of the State's sovereign powers, and do not purport to set standards to be followed in all areas of the state commission's endeavors."

Id. at 771.

FERC, then, stands for the proposition that the federal government may establish certain minimum procedures that states will be required to follow as part of a scheme of cooperative federalism.[101] Because the procedures themselves do not actually compel a state's exercise of its

[101] To be blunt about it, as Justice Powell recognized, *FERC* actually holds that federal procedures may be forced on state regulatory institutions. *See FERC*, 456 U.S. at 772 (Powell, J., concurring in part) (stating that "PURPA forces federal procedures on state regulatory institutions" "regardless of established procedures before state

police powers, even if, practically speaking, they impel the state to act in a certain way, state sovereignty is protected because the scheme, while perhaps "extraordinarily intrusive" in an area of integral governmental functions, provides for state participation in an area that is otherwise preemptible. In the instant proceeding, the Commission is seeking accommodation in the sundry land use regulatory regimes of the several states by endeavoring to create a cooperative scheme for tower siting, an area it could otherwise preempt. The procedural components of the proposed rule, therefore, pass constitutional muster because they do not require the state to exercise its police powers even if they strongly encourage it to do so.

3. The proposed rule is consistent with Tenth Amendment constraints

Hodel and *FERC* illuminate where *New York* and *Printz* will constrain federal governmental power. *Printz* will not allow the Commission to require local zoning officials to enforce either a congressionally-mandated or Commission-determined regulatory program. *New York* will not permit the Commission to compel state or local legislative entities to enact land use or environmental requirements. *Hodel* and *FERC*, however, do permit the Commission to prescribe both federal minimum standards and procedural requirements in dealing with tower siting and radio emissions. The proposed rule, therefore, does not run afoul of Tenth Amendment concerns because it does not require state or local bureaucrats actually to do anything that their regulatory schemes do not already require. Nor does the proposed rule command state or local legislative bodies to change their substantive standards in compliance with those promulgated by the Commission. In fact, the proposed rule does not *require* state or local officials to anything whatsoever. By choosing to do

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administrative regulatory agencies").

nothing, tower siting applications will be deemed granted after the requisite number of days. The regulatory burden is therefore not borne by these officials, but, instead, the Commission, pursuant to its broad, congressionally-delegated jurisdiction, will bear responsibility for the towers.[102] While it is doubtless true that the "deemed granted" provision will motivate state and local officials to act in accordance with the Commission-promulgated procedural requirements, *Hodel*, *FERC*, and *New York* make it abundantly clear that such "encouragement" is well within the ambit of federal power.

The rule, as envisioned in this proceeding, plainly is not at all like the background check provision in *Printz*, which affirmatively required local officials to undertake activity and responsibility not already incumbent upon them. Nor does the rule structure a false choice like the take title provision in *New York*, which either commandeered the state into federal regulatory service or commanded it to legislate.[103] Instead, the rule is practically indistinguishable from those provisions at issue in *Hodel* and *FERC*. As in *Hodel*, the state or local administrative entities may continue to issue permits so long as they comport with federal standards. As in *FERC*, these entities must comply with federal procedural minima when acting on tower siting applications; but in no sense is the Commission purporting to set procedural standards in all areas of these entities' endeavors.[104]

In short, the "decided advantage" of the exercise of federal power under the Supremacy

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[102] *Cf. Hodel*, 452 U.S. at 288 (stating that when the state chooses not to act, the regulatory burden is actually borne by the federal government)

[103] *New York*, to be clear, did not disapprove of cooperative federalism programs designed at the national level *per se*, it only objected to a particular method of putting such a program into place. *See Printz*, 138 L.Ed.2d at 960 (Steven, J., dissenting).

[104] *Cf. FERC*, 456 U.S. at 771 (stating, in connection with its holding, that the federal procedural requirements "do not purport to set standards to be followed in all areas of the state commission's endeavors").

Clause will trump again in this proceeding. A rule preempting state and local land use regulations affecting tower siting and radio emissions can easily be structured to avoid improper interference with state sovereignty. NAB and MSTV are not advocating that the Commission commandeer state and local legislative processes nor conscript state and local officials into federal service.[105] Instead, what NAB and MSTV are proposing, and what they encourage the Commission to do, is for the Commission develop a cooperative scheme that seeks to effectuate significant objectives concerning DTV deployment and tower siting more generally while remaining sensitive to state and local concerns and interests. There is no question that the Commission remains free to encourage state and local entities to work with the Commission in achieving policy objectives designed to bring the best broadcasting technology can offer to the public. And, more significantly, where necessary, the Commission may preempt state and local regulations that stand as an obstacle to the accomplishment of this goal.

C. The Proposed Rule Will Not Constitute A "Taking"

As noted above, several commenters suggest that the proposed rule is constitutionally suspect in numerous other ways. These arguments may be dealt with more summarily.

The City of Philadelphia presents the most sustained argument that federal preemption of local zoning laws would violate the Takings Clause of the Fifth Amendment.[106] Unfortunately, that argument seriously mischaracterizes the cases upon which it relies and gives a fatally flawed "analysis" of current takings jurisprudence.

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[105] Indeed, as discussed above, the time limits should be set with reference to normal state/local action.

[106] *See* Comments of the City of Philadelphia at 22-33. The Takings Clause provides: "[N]or shall private property be taken for public use, without just compensation." U.S. Const. amend V.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Supreme Court noted that there exist at least two distinct categories of governmental regulatory action that may result in a taking for which just compensation is due under the Fifth Amendment. The first category of compensable takings includes those regulations that compel a physical invasion of an owner's property, no matter how slight the invasion or how weighty the public interest advanced to support them. *Id.* at 1015. *See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (holding that cable facilities occupying only 1.5 cubic feet constituted a taking). It is self-evident that any Commission-promulgated scheme of preemption of local land use regulations will not compel a physical invasion of anyone's property. Obviously, broadcasters will either buy or lease the land upon which their towers will be constructed.

The second category of compensable takings includes those regulations that deny "all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015; *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987). As the City of Philadelphia admits with regard to those landowners who neighbor tower sites, "[t]he[ir] property is still habitable, still economically useful."[107] Because federal preemption of local land use regulations will not result in a denial of "all economically beneficial or productive use of land," there will be no taking due just compensation under the Fifth Amendment. This brief analysis essentially belies any serious takings concerns.

Nevertheless, despite these categorizations, much does remain uncertain about takings jurisprudence. The *Lucas* Court, for one, admitted that there is no "set formula" for determining

[107] Comments of the City of Philadelphia at 31.

when a regulation goes "too far" and becomes a compensable taking. *Lucas*, 505 U.S. at 1015. It is clear that a taking exists where the owner of real property is forced to "sacrifice *all* economically beneficial uses . . . , that is, to leave his property economically idle." *Lucas*, 505 U.S. at 1019 (emphasis in original). It is also clear that temporary, but total, regulatory takings are compensable. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 321 (1987). It is plainly unanswered and much less clear whether a partial regulatory taking may be compensable. Nevertheless, it is plain that the proposed rule, or any preemption rule promulgated in this proceeding, is not like any regulation that the Supreme Court has found to be a taking due just compensation.

For example, the proposed rule is not similar to the circumstances presented in *Lucas*, where new zoning regulations totally prevented the owner from building any habitable structure on his beachfront lots, thereby denying his investment-backed expectations. Obviously, the rule under consideration here facilitates the building of structures, not their hindrance. More importantly, any preemption rule will be fundamentally different than the regulatory takings found in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. ___, 129 L.Ed.2d 304, 114 S. Ct. 2309 (1994), the two cases upon which the City of Philadelphia principally relies.

The City of Philadelphia makes much of the apparent lack of an "essential nexus," that is, of a rational relationship between the preemption rule and its intended goal, and on the fact that the Commission has conducted no "individualized determination" of the burdens placed on property owners as being reasonably related to the government's goal, drawing these putative requirements from *Nollan* and *Dolan*. These cases, however, are not applicable to the proposed rule. In both

Nollan and *Dolan* the state had conditioned the approval of a building permit on the property owners' grant of an easement. It was only in those circumstances that the extraction of a stick from the property owners' bundle of rights, viz. the right to exclude, triggered the "essential nexus" inquiry, first enunciated in *Nollan* (*see Nollan*, 483 U.S. at 837), and refined in *Dolan* to require an "individualized determination" that the required dedication of property, the burden, bore a "rough proportionality" to the governmental goal, the benefit (*see Dolan*, 129 L.Ed.2d at 320). It is impossible to see how any preemption rule the Commission could promulgate would require property owners neighboring tower sites to deed their land to the government.

The takings jurisprudence for general zoning laws, unlike many of the interstices of this area, is clear: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980); *see also Nollan*, 483 U.S. at 834-35 (quoting *Agins* and noting that precedent makes clear "that a broad range of governmental purposes and regulations satisfies these requirements"); *Dolan*, 129 L.Ed.2d at 316 (quoting *Agins* and noting that "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law" (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922)). The *Dolan* Court explicitly distinguished, on two grounds, general land use regulations, such as those at issue in *Agins*, *Mahon*, and *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), from the situation before it and the *Nollan* Court:

> "First, they [*Agins*, *Mahon*, and *Euclid*] involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's

> application for a building permit on an individual parcel. Second, the conditions imposed were not simply a limitation on the use petitioner might make of her own parcel, but a requirement that she deed portions of the property to the city."

Dolan, 129 L.Ed.2d at 316. *Nollan* and *Dolan*, and their analyses, are simply inapposite to the type of rule at issue in this proceeding.

To avoid takings problems, and because there is no possibility that Commission action in this proceeding will deny all economically viable or productive use of land neighboring tower sites, the Commission will only need to articulate how the preemption rule substantially advances legitimate governmental interests. Because this same articulation is already necessary to justify the preemption itself, as well as to avoid Tenth Amendment concerns, no special obstacle faces the Commission in avoiding potential Takings Clause difficulties.

The City of Philadelphia also attempts to argue that a compensable taking has occurred by depriving neighbors of tower sites of one of the sticks in their bundle of rights, the aesthetic stick. The Supreme Court, however, has clearly stated that "[a]t least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *see also Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978) (stating that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated"); *Concrete Pipe & Products, Inc. v. Construction Laborers Pension Trust*, 508 U.S. ___, 124 L.Ed.2d 539, 113 S. Ct. 2264 (1993). Statements such as "It is obvious that placing a thousand foot tower in the middle of a neighborhood of houses and small retail businesses lowers . . . the aesthetic quality of the

neighborhood"[108] are totally disjoined from the real workings of any rule preempting local zoning codes and provide no legal argument as to how those workings can possibly constitute a compensable taking in the face of current takings jurisprudence.[109] Viewed in the aggregate, a Commission-promulgated preemption rule will cause no encroachment, no requirement that an easement be deeded to the government, and no deprivation of all economically viable use — in short, no taking.

D. The Proposed Rule Does Not Violate The First Amendment

Turning to the remaining alleged constitutional impediments, it is likewise evident that a rule preempting state and local land use regulations causes no First Amendment difficulties, as argued

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[108] Comments of the City of Philadelphia at 28.

[109] The City of Philadelphia relies on *McKinney v. City of High Point*, 74 S.E.2d 440 (N.C. 1953) for its entire argument on so-called aesthetic takings that "the loss of aesthetic value resulting from construction of a water tower could be a taking." Comments of the City of Philadelphia at 28. That statement grossly mischaracterizes *McKinney*. In the posture of that case, appeal from a demurrer, the court held only that, taking the amended complaint as true, the plaintiffs had sufficiently stated a claim to go forward where the city had not followed the procedures of its own City Code in erecting a municipal utility and where the amended complaint alleged

> "that the construction and maintenance of this tank in a zoned Residence 'A' District has cheapened, and materially damaged their property; that the maximum height of a public or semi-public building permitted by the defendant's ordinance is 60 feet and this tank is 184 feet high; that their home stands in the shadow of it; that it is painted a bright silver color so that the reflection of the rays of the sun upon it causes a continuous and blinding glare; that the construction, maintenance and operation of the tank has defeated the purpose for which the section was zoned."

Id. at 447. This litany of allegations comprises much more than just aesthetic considerations, indicating, at the very least, that more than one stick in the bundle of rights had been implicated. In any event, the case certainly does not hold that a so-called aesthetic taking had occurred, nor does it stand for the proposition that a so-called aesthetic taking requires just compensation. The court, in these circumstances, merely permitted the case to go forward. In the 44 years since its decision, no court — in North Carolina or any other state — has cited *McKinney* as authority on any issue concerning so-called aesthetic takings, for indeed it is not such authority.

by several commenters.[110] It is suggested that the preemption rule will somehow "chill" the speech of those who wish to speak out on issues related to tower siting or will infringe the right to petition the government. These suggestions, however, entirely ignore the fact that the type of preemption rule at issue neither expressly nor impliedly bars any protected First Amendment activity. All citizens — whether a member of the general public, a local zoning official, or a legislator — remain perfectly free, subject to whatever independent, lawful restrictions may otherwise exist,[111] to voice their concerns about the environment, public health, aesthetics, or any other aspect of radio communication that may be on their minds. The general public may rally in protest of the siting of a particular tower, a local official may speak her mind about the alleged health effects of radio frequency emissions, a legislator may complain about the pace of DTV roll-out. The preemption rule has no effect on these activities whatsoever.

Noticeably absent from the commenters' First Amendment arguments is citation to any authority that supports their view that the type of governmental regulation at issue in this proceeding violates the fundamental rights guaranteed by the First Amendment. The laudatory First Amendment principles expressed in *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994), and *United States v. Cruikshank*, 92 U.S. 542 (1876), which broadcasters, of all people, support to the

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[110] *See* Comments of Concerned Communities and Organizations at 35-38; Comments of the City of Dallas et al. at 17-19; and Comments of the National League of Cities et al. at 8-10. The First Amendment provides in pertinent part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

U.S. Const. amend. I.

[111] There may be properly tailored time, place, or manner restrictions that prevent someone, for example, from standing directly outside a local administrator's office and discoursing loudly, even on matters of public concern.

fullest, simply cannot shoulder the load the commenters force on them.[112]

What the commenters apparently fail to recognize, but what the Supreme Court has made abundantly clear, is that, while the First Amendment assures the right to speak, there is no constitutional guarantee to be heard. As the Court stated in *Minnesota State Board for Community Colleges v. Knight*, 465 U.S. 271 (1984):

> "Nothing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals' communications on public issues."

Id. at 285; *see also Smith v. Arkansas State Highway Employees*, 441 U.S. 463, 465 (1979) (stating that one "surely can associate, and speak freely and petition openly, and he is protected by the First Amendment from retaliation for doing so. But the First Amendment does not impose any affirmative obligation on the government to listen[or] to respond . . . ." (citations omitted)). That the proposed preemption rule may telescope the period in which individuals can speak is therefore irrelevant to this First Amendment analysis. And while the right to petition is implicit in "[t]he very idea of government, republican in form," *Cruikshank*, 92 U.S. at 552, as the City of Dallas points out, also "inherent in a republican form of government" is the fact that "direct public participation in government policy making" is necessarily limited. *Knight*, 465 U.S. at 285.

Just as First Amendment jurisprudence rejects a right to be heard, the Supreme Court long ago "rejected due process as a source of an obligation to listen." *Knight*, 465 U.S. at 285. In *Bi-Metallic Investment Company v. State Board of Equalization*, 239 U.S. 441 (1915), the Court

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[112] *See* Comments of Concerned Communities and Organizations at 37 (quoting *Turner Broadcasting*); Comments of the City of Dallas et al. at 17 (quoting *Cruikshank*). The comments are remarkably bereft of any other discussion of even remotely relevant First Amendment jurisprudence.

rejected a Due Process claim that the Constitution somehow grants members of the general public a right to be heard by public bodies making policy decisions. As Justice Holmes explained:

> "Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."

Id. at 445.[113]

This very rulemaking proceeding is giving the public its opportunity to be heard. Commenters of all viewpoints have expressed their policy preferences. The Constitution requires no more. The Commission will adopt a rule that, in accommodating the federal and nonfederal interests, will further those objectives with respect to radio communication that it determines best serve the public interest and that will preempt state and local regulations to the extent they stand as obstacles to those goals. Should certain individuals be dissatisfied with this outcome, they will be

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[113] *Bi-Metallic* stands for the dual proposition that the processes of representation themselves provide a sufficient guarantee of legitimacy to legislative determinations, essentially serving the same ends as a hearing, and that due process is not offended by the impracticality of holding hearings for determinations where large numbers of people are affected. Two commenters suggest that Fifth and Fourteenth Amendment due process "rights" will be infringed because landowners potentially affected by tower siting applications will not receive the notice they are due. *See* Comments of Concerned Communities and Organizations at 38-39; Comments of the City and County of San Francisco at 14-15. But because there is no constitutional right to be heard by public bodies making policy decisions, no particular due process "right" of these potentially affected landowners will have been infringed. Concerned Communities further argues that notice and an opportunity to be heard do attach to deprivations of life, liberty, or property. Presumably Concerned Communities means to suggest that it is a property interest that would be deprived by operation of the preemption rule since it states that takings claims would arise as a result of the insufficiency of the notice period. However, as demonstrated above, the type of preemption rule at issue in this proceeding can effect no taking because no encroachment or deprivation of all economically viable use will occur. No other life, liberty, or property interest appears to be at stake. In any event, as discussed above in Section IV.B, the rule adopted by the Commission should leave a sufficient amount of time for local bodies to comply with state or local notice requirements.

free to protest and they will be free to express their displeasure at the ballot box. But the Constitution will not be offended by this process: "A person's right to speak is not infringed when government simply ignores that person while listening to others." *Knight*, 465 U.S. at 288.

VI. ADOPTION OF THE PROPOSED RULE WOULD NOT REPRESENT A MAJOR FEDERAL ACTION AFFECTING THE ENVIRONMENT

One commenter has argued that before the Commission may adopt a preemption rule in this proceeding it must prepare an environmental impact statement ("EIS") in accordance with the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA").[114] NEPA, in fact, does require that the Commission, as an agency of the federal government, prepare an EIS in "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(C). It is well-settled, however, that the "initial determination concerning the need for an EIS lies with the agency." *City of Aurora v. Hunt*, 749 F.2d 1457, 1468 (10th Cir. 1984); *see also Image of Greater San Antonio, Tex. v. Brown*, 570 F.2d 517 522 (5th Cir. 1978).[115]

The commenter seems blissfully unaware that the Commission has, in fact, already made the determination of how its jurisdiction over broadcast towers intersects with the requirements of NEPA and has implemented rules to that effect. *See generally* Part 1, Subpart I of the Commission's Rules, 47 C.F.R. § 1.1301 et seq. (Procedures Implementing the National Environmental Policy Act

[114] *See* Comments of Concerned Communities and Organizations at 24-29.

[115] The agency's decision not to file an EIS will be reviewed by the courts for the reasonableness of its conclusion that the agency action will have no significant environmental consequences. *See Hunt*, 749 F.2d at 1468 (citing cases).

of 1969).[116] These rules require, *inter alia*, that all radio broadcast services subject to Part 73 of the Commission's Rules be subject to routine environmental evaluation. Thus those broadcast facilities that are to be located in wilderness areas, wildlife preserves, or flood plains, or that may affect threatened or endangered species or critical habitats, or whose construction will involve significant change in surface features, or antenna towers to be located in residential areas that are to be equipped with high intensity white lights already require the preparation of an Environmental Assessment. *See* 47 C.F.R. § 1.1307(a). These Environmental Assessments must include a significant amount of information on the environmental aspects of facility construction or modification, including a "statement as to the zoning classification of the site, and communications with, or proceedings before and determinations (if any) made by zoning, planning, environmental or other local, state or federal authorities on matters relating to environmental effect." 47 C.F.R. § 1.1311 (a)(2).

The procedures the Commission has implemented fully comply with NEPA. NEPA does not require the Commission to elevate environmental concerns above its other legitimate policy objectives. *See Baltimore Gas & Elec. Co. v. Natural Resources Defense Council*, 462 U.S. 87, 97 (1983); *Strycker's Bay Neighborhood Council v. Karlen*, 444 U.S. 223, 227 (1980) (per curiam). The Commission's previous rulemaking proceedings already constitute the "hard look" at environmental consequences that NEPA requires. *Baltimore Gas*, 462 U.S. at 97. Indeed, NEPA does not and cannot alter the structure of a federal agency's internal decisionmaking, for agencies must be "free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them

[116] In the 1980s, the Commission also conducted a series of rulemaking proceedings, in further compliance with NEPA, that considered the effects of radiofrequency radiation on the human environment. *See, e.g.*, In re Responsibility of the Federal Communications Commission to consider biological effects of radiofrequency radiation when authorizing the use of radiofrequency devices. *Report and Order*, 100 FCC 2d 543 (1985); *Second Report and Order*, 2 FCC Rcd 2064 (1987); *Third Report and Order*, 3 FCC Rcd 4236 (1988).

to discharge their multitudinous duties." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 543 (1978) (internal quotation marks and citations omitted); *see also Baltimore Gas*, 462 U.S. at 100. The type of generic method chosen by the Commission to evaluate the environmental effects of broadcast facilities presents no barrier to compliance with NEPA's mandate. *See Baltimore Gas*, 462 U.S. at 101; *see also Vermont Yankee*, 435 U.S. at 535 n.13, 548. As the *Baltimore Gas* Court specifically stated with regard to generic determinations of environmental impacts:

> "Administrative efficiency and consistency of decision are both furthered by a generic determination of these effects without needless repetition of the litigation in individual proceedings, which are subject to review by the Commission in any event."

Baltimore Gas, 462 U.S. at 101.

The preemption rule at issue in this proceeding does nothing to alter the extensive procedures the Commission has already determined will best comport with NEPA. To suggest that the Commission needs to issue another EIS for the preemption rule broadly, or for any aggregate of broadcast facilities affected by the proposed rule, misstates the requirements of NEPA and would lead to needless administrative inefficiencies. NEPA was not intended "to give citizens a general opportunity to air their policy objections to proposed federal actions." *Metropolitan Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 777 (1983).[117] The Commission already carefully

[117] The Supreme Court has specifically rebuked those who would use NEPA to obstruct the federal administrative process:

> "[A]dministrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure references to matters that 'ought to be' considered and then, after failing to do more to bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters 'forcefully presented.'"